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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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Civil No. 08cv1497-L(JMA)

11 CUSTOM WINDOW COMPANY, )

12 Plaintiff, )

13 v. )

14 5th AVENUE PARTNERS, LLC, *et al.*, )

15 Defendants; )

16 AND RELATED COUNTERCLAIM. )  
17

**ORDER DISMISSING  
COUNTERCLAIM WITHOUT  
PREJUDICE AND DENYING  
MOTIONS AS MOOT**

18 This action arises out of a construction project for the Diegan Hotel. The court has  
19 subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Defendant and Counter-Claimant 5th  
20 Avenue Partners, LLC (“Fifth Avenue”) is the owner and developer of the Project. Counter-  
21 Defendant Highland Partnership, Inc. (“Highland”) is the general contractor. The Project  
22 involved numerous subcontractors, including Plaintiff and Counterclaim-Defendant Custom  
23 Window Company (“Custom Window”).

24 On August 15, 2008 Custom Window filed the instant action against AWI, Inc., a  
25 subcontractor, and Fifth Avenue for breach of contract, foreclosure of mechanic’s lien and other  
26 State law claims. On October 20, 2008 Fifth Avenue filed a counterclaim against Custom  
27 Window, Highland, Travelers Casualty and Surety Company of America, American Window All  
28 Industries, Inc. aka AWI, Inc. and TWD, LLC for breach of contract, fraud, breach of

1 performance and payment bonds, injunctive and declaratory relief, disgorgement and several  
2 other business torts under State law ("Counterclaim"). "Prior to filing the Counterclaim, [Fifth  
3 Avenue] filed an action in the San Diego Superior Court against the same parties to the  
4 Counterclaim and alleging the same causes of action." (Decl. of Keli Osaki at 1.)


5 Because it appeared that the State court action was filed first, covered the same parties  
6 and claims as the Counterclaim in this action, and because the State court action appeared to be  
7 pending concurrently with this action, this court issued an Order to Show Cause, directing Fifth  
8 Avenue to show cause why this court should not abstain pursuant to the doctrine articulated in  
9 *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-19 (1976), and  
10 its progeny.

11 On September 4, 2009 Fifth Avenue responded to the Order to Show Cause and stated it  
12 did not object to a dismissal without prejudice, given that an identical action was filed first in  
13 State court and is pending concurrently with the Counterclaim. Although Counter-Defendants  
14 were provided an opportunity to respond, they did not timely do so. The record reflects no  
15 objection to dismissal of the Counterclaim without prejudice.

16 Accordingly, based on the foregoing, the Counterclaim filed by 5th Avenue Partners,  
17 LLC is hereby **DISMISSED WITHOUT PREJUDICE**. The motions to compel arbitration  
18 filed by Counter-Defendants Highland Partnership, Inc. and Travelers Casualty and Surety  
19 Company of America are **DENIED** as moot.

20 **IT IS SO ORDERED.**

21  
22 DATED: September 9, 2009

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M. James Lorenz  
United States District Court Judge